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Dear Judge Meyer,

### **ALRC Inquiry into the Incarceration of Aboriginal and Torres Strait Islander People**

I refer to Discussion Paper 84 and to the visit by yourself and other ALRC representatives to this office on Wednesday 2<sup>nd</sup> August 2017. I am pleased to make a submission to the Inquiry. Our submission will focus on those aspects of the Discussion Paper which fall within the Legal Services Commission's frame of reference.

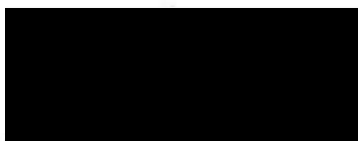
The Legal Services Commission of South Australia (LSC) is the largest provider of legal assistance services in this State and also the State's largest criminal law defence practice. The LSC provides legal representation services to indigenous and non-indigenous persons who can meet our guidelines for the receipt of a grant of legal aid. In order to receive a grant of legal aid for representation in a criminal matter, a client must, amongst other criteria, be facing a risk of imprisonment.

In the 2015-16 financial year, the LSC provided a range of legal assistance services to 26,384 clients. Of those clients, almost 9% identified as Aboriginal or Torres Strait Islander. This group received 5,436 services of which 2,583 were grants of aid. Of those grants, 2,146 were for criminal law matters. Our northern regional office in Whyalla and Port Augusta provided 1,053 of the total services to indigenous clients.

In the preparation of this submission I have consulted with senior LSC staff, including our Chief Counsel, who has worked with Aboriginal clients in the criminal jurisdiction over many years. They have commented that overall Aboriginal peoples' experience of the justice system is a negative one, leading to deep mistrust and lack of respect for the law. Cultural disempowerment has only exacerbated this situation. It is their view that much could be improved by working with Aboriginal communities in delivering justice where possible and appropriate.

Our formal submission follows this letter. Thank you for the opportunity to make a submission to this Inquiry.

Yours sincerely,



Gabrielle Z Canny  
Director

## Submission of the Legal Services Commission of South Australia

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### 2. Bail and Remand

**Proposal 2–2** *State and territory governments should work with peak Aboriginal and Torres Strait Islander organisations to identify service gaps and develop the infrastructure required to provide culturally appropriate bail support and diversion options where needed.*

Aboriginal defendants can face two difficulties with regard to bail, the first of which is finding a guarantor. In the United States, several jurisdictions have Community Bail Funds that provide bail for underprivileged defendants.<sup>1</sup> In New York for example, the revolving community bail fund<sup>2</sup>, which operates under the *New York Community Bail Act* pays bail amounts of up to \$2,000 for persons charged with minor indictable and summary matters. Money is effectively “recycled” through the Fund when cases are concluded. The benefit of this system is that many individuals can remain in employment and housing while their matters are dealt with. The New York fund assists around 1,200 people annually.

The second difficulty for Aboriginal defendants is finding suitable accommodation for the bail period especially if the defendant is far from country. The South Australian Government has recently partnered with Anglicare to build a new Bail Accommodation Facility at Port Adelaide.<sup>3</sup> Similar culturally appropriate accommodation which was Aboriginal run could provide a significant benefit to Aboriginal defendants who need accommodation to secure bail and a safe haven after being arrested and charged.

### 3. Sentencing and Aboriginality

**Question 3–1** *Noting the decision in *Bugmy v The Queen* [2013] HCA 38, should state and territory governments legislate to expressly require courts to consider the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples when sentencing Aboriginal and Torres Strait Islander offenders?*

The LSC’s senior criminal practice lawyers support a nuanced approach to Aboriginal sentencing taking into account the defendant’s Aboriginality, including experience of social deprivation, in accordance with the High Court’s decision in *Bugmy v The Queen*.

### 4. Sentencing Options

**Proposal 4–1** *State and territory governments should work with peak Aboriginal and Torres Strait Islander organisations to ensure that community-based sentences are more readily available, particularly in regional and remote areas.*

The LSC believes there is considerable scope for alternative, culturally sensitive sentencing models for Aboriginal offenders in many minor matters. In South Australia, we already have an example of this in the Nunga Sentencing Court also known as Aboriginal Court Day.<sup>4</sup> The Court Day is available at the Port Adelaide, Murray Bridge, Port Augusta, Mount Gambier, Port Lincoln and Ceduna Magistrates Courts. The Nunga Court utilises

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<sup>1</sup> <http://www.businessinsider.com/bail-reformers-arent-waiting-for-the-laws-to-change-2016-8?IR=T>

<sup>2</sup> <https://brooklynbailfund.org/how-it-works/>

<sup>3</sup> <http://www.adelaidenow.com.au/messenger/west-beaches/welcome-home-sas-first-house-for-those-on-bail-on-track-to-open-by-middle-of-the-year-in-port-adelaide/news-story/41af1325c09f577f25cfec9dccb56702>

<sup>4</sup> <http://www.lsc.sa.gov.au/dsh/ch04s07.php>

sentencing conferences which operate like a roundtable discussion taking into account the views of the defendant, the victim, the families and the community as well as the medical and other rehabilitation needs of the defendant. Community elders and Aboriginal Justice Officers guide the Magistrate with advice on relevant cultural and community issues. The Aboriginal Justice Officer also provides guidance and support to defendants, their families and the community on court process and outcomes. The South Australian *Office of Crime Statistics and Research* has produced an **Information Bulletin** analysing the benefits of the Nunga Court.<sup>5</sup>

**Question 4–2** *Should short sentences of imprisonment be abolished as a sentencing option? Are there any unintended consequences that could result?*

The abolition of sentences of less than six months duration and their replacement by community and home detention and rehabilitation initiatives would be of particular benefit to Aboriginal offenders.<sup>6</sup> Legislative provisions and cultural training should guide Magistrates in applying alternative penalties to avoid problems experienced in other Australian jurisdictions which resulted in longer sentences.

**Question 3–2** *In what ways, if any, would this make the criminal justice system more responsive to Aboriginal and Torres Strait Islander offenders?*

In remote communities, justice is often delayed due to the timing of the court circuit or the Aboriginal defendant is disproportionately inconvenienced by having to travel to the nearest large town. For more minor matters, justice could be made both speedy and appropriate by adopting a version of the ancient English custom of appointing lay Magistrates<sup>7</sup> from amongst remote community elders. Such courts could have a focus on restorative justice when sentencing and penalties could include activities which benefit the community, rather than impose fines.

In some cases, a remote community may be physically closer to a courthouse in another jurisdiction, as is the case for communities on the South Australian/Northern Territory Border where the closest court is Alice Springs. Cross border co-operation agreements on forum could reduce travel and away time for Aboriginal defendants if they were permitted to attend their closest court.

## **6. Fines and Drivers' Licences**

**Proposal 6–1** *Fine default should not result in the imprisonment of the defaulter.*

*State and territory governments should abolish provisions in fine enforcement statutes that provide for imprisonment in lieu of unpaid fines.*

Nationally Aboriginal Australians are grossly over-represented in the prison system and as the Discussion Paper illustrates, imprisonment for non-payment of fines is a leading cause. The LSC supports the abolition of imprisonment for non-payment of most fines and the development of alternative sanctions. Legislation currently before the South Australian Parliament contains financial hardship provisions which allow debts to be offset by

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<sup>5</sup> [http://www.ocsar.sa.gov.au/docs/information\\_bulletins/ib39.pdf](http://www.ocsar.sa.gov.au/docs/information_bulletins/ib39.pdf)

<sup>6</sup> *Home Detention to Keep Aboriginal Offenders Out of Jail*, The Australian, 11 July, 2017, <http://www.theaustralian.com.au/national-affairs/state-politics/home-detention-to-keep-indigenous-offenders-out-of-jail/news-story/e80666e23e8791dc26aea5da3f9ce0c9>

<sup>7</sup> <https://www.judiciary.gov.uk/about-the-judiciary/who-are-the-judiciary/judicial-roles/magistrates/>

attending treatment programs and community service.<sup>8</sup> Another such sanction could be assisting an Aboriginal offender to obtain a driver's licence.

The LSC is aware that many Aboriginal people who live remotely find it difficult to comply with the current requirements to obtain a driver's licence despite the fact that remoteness makes driving an essential skill. Many remote Aboriginal persons are also unable to pay large, accumulated fines for driving offences and can find themselves in prison. An alternative form of testing is urgently needed for such persons, such as a return to the previous model of a single, practical driving test conducted by local police.

Recently the South Australian Government introduced the concept of **adult cautions**.<sup>9</sup> Cautions were previously only available in the juvenile justice system. With co-operation from the police, cautions could be effectively used with many Aboriginal defendants in minor, public disorder offences such as 'offensive language'. There should be scope to extend the ability to issue cautions to Aboriginal workers in the justice system because offenders are likely to have a higher level of respect for cautions issued in such a manner.

## 9. Female Offenders

**Question 9–1** *What reforms to laws and legal frameworks are required to strengthen diversionary options and improve criminal justice processes for Aboriginal and Torres Strait Islander female defendants and offenders?*

The escalating rate of Aboriginal women in custody is rightly of great concern not only for its impact on the individuals incarcerated but for the flow-on damage to families. Home and community detention programs, as previously mentioned, would be particularly effective for this group of defendants, such as access to education and training, health programs and assistance to escape domestic violence.

In South Australia, we do not currently have Mother-and-Infant Facilities at the Adelaide Women's Prison. In March this year, the University of South Australia produced a report for the Correctional Services Minister on the provision of such a facility.<sup>10</sup> The report found that access to such facilities significantly lowers the risk of reoffending and, overall, the outcomes are significantly improved for both mother and child.

## 11. Access to Justice Issues

**Proposal 11–1** *Where needed, state and territory governments should work with peak Aboriginal and Torres Strait Islander organisations to establish interpreter services within the criminal justice system.*

The LSC is acutely aware of the difficulties in obtaining the services of translators for Aboriginal defendants in the justice system. As identified in the Discussion Paper, problems range from conflicts of interest to a complete inability to find a sufficiently competent bilingual speaker willing to act. This is a problem which could benefit longer term from a properly funded and resourced technological solution<sup>11</sup>. Computerised translation services, of which the most well-known is perhaps Google Translate but there are others, are increasing in competency together with advances in artificial intelligence. I note that last year the *Australian Institute of Aboriginal and Torres Strait Islander Studies* (AIATSIS)

<sup>8</sup> *Fines Enforcement and Recovery Bill 2017*

<https://www.legislation.sa.gov.au/LZ/B/CURRENT/FINES%20ENFORCEMENT%20AND%20DEBT%20RECOVERY%20BILL%202017.aspx>

<sup>9</sup> <http://www.lawhandbook.sa.gov.au/ch03s01s02.php>

<sup>10</sup> J McIntyre, *Mother-and-Infant Facilities at Adelaide Women's Prison, A Cost Effective Measure in the Best Interests of the Child*, <http://search.ror.unisa.edu.au/media/researcharchive/open/9916119902101831/53142519590001831>

<sup>11</sup> <http://www.prnewswire.com/news-releases/australian-start-up-taps-ibm-watson-to-launch-language-translation-earpiece-300472072.html>

launched a foundation to record Aboriginal languages, including the creation of dictionaries.<sup>12</sup> Such a project could feed into the development of an automated translation assistant.



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<sup>12</sup> <http://www.abc.net.au/news/2016-10-19/race-to-save-indigenous-languages-as-they-fade-away/7946006>